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In the Supreme Court of the United States

No. 75-1477

DONALD C. LITTLE AND JOHNNIE MOHON, Co-executors of the Estate of Jacqueline Elkins Shelton, a Deceased Osage Indian,

Petitioners,

vs.

THE STATE OF OKLAHOMA AND THE OKLAHOMA TAX COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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TABLE OF CONTENTS

Citations to Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision Involved 3

Statement of the Case 3

Reasons for Granting a Writ—

Substantial Rights of Many Governmental Entities, Many Domiciliary Executors and Administrators and Many Private Citizens Are Dependent Upon a Definite Statement by This Court As to the Right and the Ability of the State of Oklahoma to Collect the Estate Taxes in Question From the Estate of a Deceased Kansas Resident Who Died a Non-Resident of the State of Oklahoma 9

Conclusion 22

Appendix A—Opinion of the Oklahoma Supreme Court A1-A8

Table of Authorities

CASES

Asenap, et al. v. *United States*, 283 F. Supp. 566 (1968) 6

Big Eagle v. *United States*, 300 F.2d 765 (1962) 5, 6

Carpenter v. *Shaw*, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 20

Choate v. *Trapp*, 224 U.S. 665 (1912) 7, 22

Re Denison, 38 F.2d 662 (D.C. Okla.) 22

Holmes v. *Walton*, N.J. Archives (2d Ser.) Preface Vol. V; A. J. Beveridge's John Marshall, Vol. III, page 611 21

McCurdy v. *United States*, 264 U.S. 484, 44 S.Ct. 345, 68 L.Ed. 801 22

McCurdy v. *United States*, 246 U.S. 263, 38 S.Ct. 285, 62 L.Ed. 289 22
Mason v. *United States*, 461 F.2d 1364 (1972) 6, 16
New Jersey v. *Wilson*, 7 Cranch. 164 (1812) 21
Oklahoma Tax Commission v. *United States*, 319 U.S. 602 .....12, 13, 14, 15, 16
Squire v. *Capoeman*, 351 U.S. 1 (1956) .....2, 5, 6, 7, ...11, 14, 15, 16, 17, 18, 22
Taylor v. *Tayrien, et al.*, 51 F.2d 884 .....4, 12, 13, 14, 22
United States v. *Rickert*, 138 U.S. 432 (1903) 18, 20, 22
United States and Oklahoma v. *Mason*, 93 S.Ct. 2202 (1973) 10, 11, 18
West v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948) 2, 3, 15

STATUTES

Amendment XIV, Constitution of the United States 3
K.S.A. 79-1501(e) 9
Oklahoma 68 O.S. (1975) Sec. 807 (A)(1)(b) 9
Osage Allotment Act of 1906, 34 Stat. 539 ..... 3, 4
Osage Allotment Act, 37 Stat. 86, 88 3
Osage Allotment Act, 52 Stat. 1034, Sec. 3 4
Osage Allotment Act, 61 Stat. 747 4
Osage Allotment Act, 62 Stat. 18, 82 4
86 Stat. 1296 (1972) 16
25 U.S. Code 331 6
25 U.S. Code 883c 16

MISCELLANEOUS

Federal Indian Law 1030 (U.S. Department of Interior, 1958) 14
Oklahoma Tax Commission Order No. 60-799 9
U. S. Administrative Tax Rulings 69-164 and 70-116 ....11, 18

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No. .....

DONALD C. LITTLE AND JOHNNIE MOHON, Co-executors of the Estate of Jacqueline Elkins Shelton, a Deceased Osage Indian,

Petitioners,

vs.

THE STATE OF OKLAHOMA AND THE OKLAHOMA TAX COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Petitioners, Donald C. Little and Johnnie Mohon, Co-executors of the Estate of Jacqueline Elkins Shelton deceased, pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Oklahoma entered into the above captioned case on December 16, 1975 in Cause No. 47-430 in that Court.

CITATIONS TO OPINION BELOW

The Supreme Court of Oklahoma's written Opinion is reported at 544 P.2d 495 (1975). A copy of the Decision of the Supreme Court of Oklahoma is contained in the appendices to this petition.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on December 16, 1975. On the 4th day of March, 1976, Mr. Justice White granted the petitioners' application for additional time in which to file their petition for a writ certiorari to April 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3)

QUESTIONS PRESENTED

I. Are Osage tribal mineral interests or headrights includable in or taxable as part of the gross estate of a Kansas domiciled decedent Osage whose estate is being administered and distributed in Kansas by these Kansas co-executors?

II. What is an Osage headright?

III. Does a Certificate of Competency which only removed restrictions on the Osage's surface land have anything to do with the restricted mineral interests or headrights that still remain under title and under trust to the United States until 1984?

IV. Should *West* v. *Oklahoma Tax Commission* be either overruled, expressly modified, or distinguished from this instant case?

V. Was the Supreme Court of Oklahoma in error in failing to hold that this Kansas domicilary Shelton estate was governed by this Court's unanimous decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956) and was it in error in holding that this instant case was governed by the Court's decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948)?

VI. Whether the State of Oklahoma consistent with the constitution and laws of the United States can levy an inheritance tax on the headrights of a deceased Osage Indian?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the United States Constitution:

"Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This is an appeal from the decision of the Oklahoma Supreme Court which affirmed the Oklahoma Tax Commission's Order No. 60-799 of March 7, 1974 which order disallowed and denied a refund to the taxpayer, the Jacqueline Elkins Shelton Estate, of $10,753.43 additional Oklahoma Estate taxes which the taxpayer had paid under protest, on January 28, 1970. The protested tax was levied upon 10.77837 Osage Indian headrights or mineral interests in the Osage Tribal trust of which the United States is now and will be trustee until 1984.

Petitioners are the co-executors of the Estate of Jacqueline Elkins Shelton, appointed by the Domicilary Probate Court in Wyandotte County, Kansas, and also Ancillary co-executors of the Will in the Ancillary proceedings No. 8247 in the County Court of Osage County, Oklahoma.

Under the Osage Allotment Act of 1906, 34 Stat. 539, Osage lands were allotted to the 2229 enrolled tribal mem-

bers, but such lands were subject to restrictions on alienation until the owners had received a Certificate of Competency that allowed them to alienate only the surface lands but not the minerals under the surface lands.

Amendments to the Osage Allotment Act in 1912 and in 1947 (37 Stat. 86, 88; 61 Stat. 747) specify that the restricted lands, funds and mineral interests held in trust and under restrictions "shall not be subject to lien, levy, attachment, or forced sale * * * prior to the issuance of a Certificate of Competency". 61 Stat. 747.

At the termination of the Osage Tribal trust as now extended to 1984 (52 Stat. 1034, Sec. 3), the lands, mineral interests and monies * * * held in trust by the United States, shall be the absolute property of the 2229 individual members of the Osage Tribe * * * or their heirs. (34 Stat. 544). The present right of a tribal member in this trust fund is commonly referred to as his "headright". (*Taylor* v. *Tayrien, et al.*, 51 F.2d 884).

In amendments to the Osage Allotment Act Congress provided for the issuance of a Certificate of Competency to certain members of the Osage Tribe which only removed existing congressional restrictions on the Osage lands under restrictions. However, the Osage Act as amended provided for a delayed allotment of the Osage tribal mineral interests or headrights until 1984.

By Act of February 5, 1948 (62 Stat. 18) Congress provided for the granting of Certificates of Competency to certain members of the Osage Indian Tribe in Oklahoma allowing them to dispose of their Osage surface land but specifically excepted and exempted the owners headright or shares in the Osage mineral trust from the operation of the Certificate of Competency in the following language:

> "Provided, That all restrictions against alienation of the property of every kind and character, except headright shares or interest in the Osage tribal mineral estate of members of the Osage Tribe who now have, or may hereafter receive, a certificate of competency, are hereby removed."

On September 29, 1950 Jacqueline Elkins Shelton received such a Certificate of Competency to become effective 30 days from September 29, 1950.

On May 17, 1967 Jacqueline Elkins Shelton died a resident of Kansas.

On February 4, 1970 the Oklahoma Tax Commission assessed an additional inheritance tax of $10,375.05 on decedent's 10.77837 Osage headrights. (Transcript of Oklahoma Tax Commission, page 32, Ex. 2).

On October 31, 1969 this Estate had protested the Oklahoma Tax Commission's inclusion of the Osage mineral headrights in the Oklahoma gross estate and directed the attention of the Tax Commission to *Squire* v. *Capoeman*, 351 U.S. 1 (1956); and *Big Eagle* v. *United States*, 300 F.2d 765 (1962). (Transcript of Oklahoma Tax Commission, page 44, Ex. 6).

On January 16, 1970 this Estate filed with the Oklahoma Tax Commission this taxpayer's written objections to the written audit of the Oklahoma Tax Commission of December 18, 1969 assessing an additional inheritance tax on this Shelton Estate. Because it included a tax assessment on 10.77837 Osage Indian headrights or mineral interests in the Osage Tribal trust which headrights taxpayer submitted are not includable in the gross estate of a deceased Osage where death occurred prior to the decedent receiving a patent in fee (in 1984) thereof.

The Oklahoma Tax Commission's attention was again invited to *Asenap, et al.* v. *U. S.*, 283 F. Supp. 566 (1968); *Squire* v. *Capoeman*, 351 U.S. 1 and to Title 25 U.S. Code, Sec. 331; and also to other objections included and stated in taxpayer's protest of January 16, 1970. (Tr. 35, 36, 37, Ex. 3).

On January 28, 1970 petitioners paid additional tax assessment on 10.77837 headrights of $10,754.32 in full payment but paid the same under objections and protest. (Tr. 53, Ex. 14).

On September 7, 1973 the Oklahoma Tax Commission notified this co-executor, Donald C. Little, that the Estate's tax protest was set for hearing on September 21, 1973.

On March 18, 1974 taxpayer filed "Notice of Intention to Appeal to the Oklahoma Supreme Court" from Tax Commission's Order No. 60-799. (Transcript p. 64).

On April 6, 1974 taxpayer filed in the Oklahoma Supreme Court their "Petition in Error" assigning as errors 17 grounds for appeal including:

> No. 6. That said Tax Commission erred in not holding that under *Squire* v. *Capoeman*, 351 U.S. 1; *Big Eagle* v. *U. S.*, 300 F.2d 765 (1962); *Mason* v. *United States*, 461 F.2d 1364 (Court of Claims 1972) and the U. S. Revenue Rulings 69-164, the provisions that All shall be returned in 1984 was a property right to grant and that such right fully vested in the Osage Tribe of Indians and was binding on Oklahoma, and under the provisions of the 5th Amendment there was no more power to deprive Mrs. Shelton of such a tax exemption than of any other right in the property.

> No. 16. That the Oklahoma Tax Commission erred in its construction and application of the Acts of Congress and in the Federal Court interpretations of the same in not holding that the Osage Nations by a series of relinquishments of their rights to their own property had received from Congress the stipulations in the Osage Allotment Act, as amended; that the lands allotted by those acts and the mineral rights under the lands should all be returned to the individual members of the Osage Tribal trust in 1984 and, that under *Choate* v. *Trapp*, 224 U.S. 665 (1912), and *Squire* v. *Capoeman*, (supra) where such a right has vested, the Government is said to have a duty to assert for the Indian or otherwise protect that right of exemption from taxation until 1984.
>
> No. 17. That the Oklahoma Tax Commission erred in its construction and application of the Acts of Congress and in the Federal Court interpretations of the same, as cited by both the taxpayer and the Tax Commission herein, in not holding that in view of the firmly established policy of over 100 years of favorable construction of statutes where Indians are involved, especially tax statutes, Congress was on notice that if it intended any change in the law it should speak and that until Congress does speak, the mineral interests in the Osage tribal trust are exempt from both Federal and Oklahoma State estate taxes until 1984.
>
> No. 5. Oklahoma Tax Commission erred in finding that this case was governed by the Supreme Court of the United States' ruling in *West* v. *Tax Commission*, 334 U.S. 717—decided June 14, 1948 and by *United States and Oklahoma* v. *Mason*, 93 Supreme Court Report 2202—decided June 4, 1973 and in holding

that this case is not governed by the United States Supreme Court Ruling in *Squire* v. *Capoeman*, 351 U.S. 1 (decided 1956).

No. 7. Oklahoma Tax Commission erred in failing to find that Congress in providing for certificates of competency has specifically excluded, and excepted mineral headrights and royalties from such certificate at least until 1984.

No. 9. That the Oklahoma Tax Commission, under the mutual contractual reciprocal laws of both Oklahoma and Kansas, erred in not holding that this taxpayer's mineral rights and headrights are not taxable in Oklahoma.

No. 12. That Oklahoma Tax Commission erred in finding that the Osage headrights are not intangibles but represented an interest in real estate in Oklahoma.

No. 3. That said Tax Commission erred in entering the order and asking an assessment which denied the petition for a refund, petitioned for by these co-executors for the Estate of Jacqueline Elkins Shelton, deceased, in the amount of $10,754.43.

The Oklahoma Supreme Court held that these 10.77837 Osage headrights are includable in decedent's Oklahoma gross estate for inheritance tax purposes and that the Kansas decedent's headrights are interests in Oklahoma real estate, are tangible property, and not intangible property and subject to taxation in Kansas.

Taxpayer contends that this Shelton estate is exempted from such taxation and in support of that contention states that under existing Congressional Acts as amended and Federal Court decisions decedent Osage In-

dian mineral interests or headrights of the Osage mineral tribal trust of which the United States is trustee, until 1984, are not includable in or taxable as part of a decedent's gross estate either by the United States Internal Revenue Service or by the State of Oklahoma.

Taxpayer further contends that since Mrs. Shelton died a resident of the State of Kansas and a non-resident of Oklahoma as was so found by the Oklahoma Tax Commission's Order No. 60-799, then her Estate's 10.78837 Osage headrights, belonging to a deceased Kansas resident, could not be includable in her gross estate in Oklahoma.

Petitioners feel that even if these headrights are taxable through *West* they could be subject to taxation only in Kansas as intangible personal property which because of reciprocity statutes of Kansas, K.S.A. 79-1501(e) and Oklahoma 68 O.S. 1971, Sec. 807(A)(1)(b) as amended by 68 O.S., Sec. 807(A)(1)(b) (Supp. 1975) is taxable, if at all, at the Kansas domicile of the decedent.

REASONS FOR GRANTING A WRIT

Substantial Rights of Many Governmental Entities, Many Domiciliary Executors and Administrators and Many Private Citizens Are Dependent Upon a Definite Statement by This Court As to the Right and the Ability of the State of Oklahoma to Collect the Estate Taxes in Question From the Estate of a Deceased Kansas Resident Who Died a Non-Resident of the State of Oklahoma.

The Osage trust, unless modified by Congress, will remain in effect until 1984. During that time the question of the right of Oklahoma to tax estates such as this will

arise regularly. It is important, therefore, that the law be clarified so that the United States, as trustee, may know whether it remains bound to pay such taxes, and if so, on what portion of the decedents' estates. (See Brief of the United States, page 18, filed in *Oklahoma* v. *Mason*, 93 S.Ct. 2202 (1973).)

All this Court decided in the *Mason* case was that—The United States did not breach its fiduciary duty, as trustee of the Osage tribal trust mineral property, by paying Oklahoma inheritance tax assessed against the Estate of restricted Osage Indians in reliance on prior United States Supreme Court decisions which upheld the validity of that tax as applied to the same kind of an estate of a deceased Oklahoma resident; and it could not be said that the United States did not act with the requisite care and skill in refusing to contest the Oklahoma tax.

However, even though the United States was itself protected against having to repay and refund the tax to the petitioners, the Court, at page 2207, firmly ruled and firmly stated:

> "We need not decide, however, whether in a case squarely presenting the issue, we would continue to adhere to West. For the issue in this case is not whether West should be overruled, but whether the United States breached its fiduciary duty in failing to anticipate that it would be overruled. * * *
>
> *"When the question is so posed, we think that the answer is obvious. There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, is duty bound to exercise great care in administering its trust."*

At page 2208 the Court states:

> "* * * But in this context at least, it is unnecessary to penalize the United States' proper reliance on our past decisions in order to reexamine them, *since there is no bar to a suit by plaintiffs below directly against Oklahoma for recovery of the tax.*" (Emphasis ours).

This Shelton case is a case where the petitioners having paid the tax, under protest (on January 28, 1970), are now bringing this action for recovery and refund of this tax, which the Supreme Court of the United States has said in the *Mason* case the taxpayers *have a right to do.*

The obligation of the trustee (United States) is to transfer and return all at the end of the trust and Certificate of Competency Act (in 1984) the land, cash and payments received for oil and gas and severed timbers, etc., undiminished by any deductions levied thereon by the guardian or trustee (United States).

If Federal inheritance or income taxes, or any State inheritance or income taxes are withheld, or held back from the turnover, then all will not be turned over to the plaintiffs (*Squire* v. *Capoeman*, 351 U.S. 1).

I.

Are Osage tribal mineral interests or headrights includable in or taxable as part of the gross estate of a Kansas domiciled decedent Osage whose estate is being administered and distributed in Kansas by these Kansas co-executors?

Since 1956 the *Squire* v. *Capoeman* reasoning supporting the tax exemption of restricted Indian trust properties has been uniformally applied in the lower Court cases and also in the United States Administrative Tax Rulings, 69-164 and 70-116.

Furthermore, the *Oklahoma Tax Commission* Opinion and the *West* Opinion both indicated that the Court *then* relied on the fact that the United States was collecting Federal estate taxes at that time, from the Osage Indian trust estates. The *Oklahoma Tax Commission's* opinion stated (319 U.S. at 608): "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes."

Since 1969 the United States Internal Revenue Service has ruled these Osage restricted trust properties are immune from Federal estate taxes. Thus, the demand for equal treatment which seem to move the Court in Oklahoma Tax Commission and West, now works the other way—against taxability.

II.

What is an Osage headright?

In *Taylor* v. *Tayrien, et al.*, 51 F.2d 884 at page 886 the 10th Circuit Court of Appeals defined a headright as follows:

> "The right of Osage Indian in these funds and to participate in these distributions is called a headright. * * *"

This means that all these quarterly distributions added together constitute the whole of each Osage mineral interest or Osage headright, since the sum of all the parts (total of all quarterly distributions) must equal the sum of the whole—it follows that the United States, as trustee, cannot return all of the parts of the headrights in 1984 if the headright is diminished and depleted by collecting federal income taxes from such quarterly parts of each headright.

III.

Does a Certificate of Competency which only removed restrictions on the Osage's surface land have anything to do with the restricted mineral interests or headrights that still remain under title and under trust to the United States until 1984?

In 51 F.2d 884 at 886 our 10th Circuit Court of Appeals speaking through Judge McDermott, and referring to Osage Certificate of Competency states at page 887:

> "* * * Such a certificate has nothing to do with mineral rights. The statute defines the certificate as an authority to convey surplus lands; the section authorizing such certificate provides that nothing therein shall authorize the sale of minerals. Appellant sets out in his brief the form of these certificates in use, which expressly excepts minerals from the authority thereby granted to sell his surplus lands."

And at page 892:

> "* * * We acknowledge the power of Congress to make these headrights alienate; what we hold is that so far Congress has not done so."

IV.

Should West v. Oklahoma Tax Commission be either overruled, expressly modified, or distinguished from this instant case?

In *Oklahoma Tax Commission* v. *United States* where the inheritance tax was imposed on the Estates of Indians of the five civilized tribes who held legal title to their property as distinguished from the Osage tribal trust Indians who did not have title to their restricted tribal property, since legal title is held by the United States, the trustee

until 1984—this Court stated in *Oklahoma Tax Commission* v. *U. S.*, 319 U.S. at 602:

> "That the restriction, without more, is not the equivalent of a Congressional grant of estate tax immunity for the cash and securities."

Petitioners invite the Court's attention to the fact that in addition to the restrictions on alienation of the Osage tribal trust properties there were many more duties of management and control superimposed on the United States Interior Department, the United States Justice Department and the United States Treasury Department for, as stated by Judge McDermott in 51 F.2d at 886:

> "* * * It is contended that as to half blood with Certificates of Competency, the trust is a 'dry' one, that the trustee has no active duties of management or contract. This is not true as to the Tribal Trust. The act places upon the trustee the very important and active duties of fixing the royalties for the mineral leases, and approving of their liens, and of collecting the royalties and distributing them partly to the maintenance of school, partly for Agency emergency purpose, and partially to the credit of the members of the Tribe." (See *Taylor* v. *Tayrien, et al.*, 51 F.2d 884).

In no other Indian tribe were the rights to oil and gas reserved to the tribe. (Semple Okla. Indian Land Titles Osages, Sec. 640).—quoted in Federal Indian Law, page 1030, Note 3. (U.S. Department of Interior 1958).

It is clear, that the approach taken by the Court in *Squire* was different from that of *West* and that this difference has had its effect on lower court decisions and executive actions. Whether *West* has in fact been impaired, and, if so, whether that impairment is fatal to its

continued vitality, can only be determined by this Court. The question of the right of Oklahoma to tax estates such as this will arise regularly during the course of the trust. It is important, therefore, that the law be clarified.

Both *West* and *Oklahoma Tax Commission* departed from the traditional liberal interpretation of the statutory and treaty rights of the Indians and held that a clear express showing of grant of tax immunity must be made. But see dissents by Mr. Justice Murphy joined by Chief Justice Stone, Mr. Justice Reed and Mr. Justice Frankfurter on the ground that majority of opinion "rejected a century and a half of history" in *Oklahoma Tax Commission* v. *United States*, (319 U.S. at page 612), and note the dissents of the Chief Justice, Mr. Frankfurter and Mr. Justice Douglas in *West* v. *Oklahoma Tax Commission*, (334 U.S. 717) (1948).

While in *Squire* v. *Capoeman*, (351 U.S. 1) 1956, the Court unanimously held to the contrary stating that there must be a clear and express showing that if Osage restricted properties are to be subjected to federal and state inheritance and income taxes, then Congress must say so, and until Congress does say so, then the Osage headrights and tribal mineral interests are immune from both federal and state inheritance and income taxes until 1984.

It is submitted that the majority opinion in *West* v. *Oklahoma Tax Commission* ignores and bypasses the cold hard fact that if such tax was leviable, Oklahoma could impose a lien on the property (334 U.S. at 725, 726, 727) and this (Kansas decedent's) trust estate could be diminished and depleted through successive payments of Oklahoma State death taxes before the end of the trust period.

While *West* demanded affirmative indications by Congress that these burdens require that the transfer be im-

mune from tax liability. (334 U.S. at 727). (See also *Oklahoma Tax Commission* v. *United States*, 319 U.S. at 604, 606, 607, 609). *Squire*, reversing the presumption, considered these burdens so important that Congress should affirmatively authorize taxability if the desire was to permit it.

Squire v. *Capoeman* neither evaded nor bypassed this issue but took the opposite position holding that provision in an allotment Statute that the restricted property was to be transferred at trust end, free from incumbrances might well be sufficient to bar taxation which is necessary to return the trust property intact for the Indian thus including its immunity from taxation. (351 U.S. at 10).

More importantly—as pointed out by the Court of Claims in *Mason* v. *United States*, 461 F.2d 1364 where *West* demanded affirmative indication by Congress that these headrights are held immune from Federal and State income and inheritance taxes—*Squire* v. *Capoeman* in effect reversed this presumption and considered and held the burdens of imposition of taxation on these trust properties so great a threat that Congress should affirmatively authorize taxability if its desire was to permit such taxation.

Finally on October 27, 1972 Congress did pass on this question of taxability of an Osage interest. This Court's attention is invited to the latest Congressional Act regarding new Osage funds (25 U.S.C. 883c, 86 Stat. 1296) approved October 27, 1972, being an act to provide for the distribution of judgment funds to certain members of the Osage tribe of Indians of Oklahoma, and stating at Section 4 that "none of these funds distributed per capita under the provisions of this act shall be subject to federal or state income taxes." Section 4 specifically exempts these Osage funds from Federal and State income

taxes—following 300 F.2d 765 - - - legislating these funds should not be subject to Federal and State income taxes —notwithstanding that the Osage had received a Certificate of Competency. If Congress wanted an Osage with a Certificate of Competency to be subject to income tax - - - Congress should have said so.

V.

Was the Supreme Court of Oklahoma in error in failing to hold that this Kansas Domiciliary Shelton estate was governed by this Court's unanimous decision in Squire v. Capoeman, 351 U.S. 1 (1956), and was in error in holding that this instant case was governed by the Court's decision, in West v. Oklahoma Tax Commission, 334 U.S. 717 (1948)?

Under the *Capoeman* decision judicial inquiry into the taxability of restricted Indian property necessitates a review of the treaties and the Congressional Acts pertinent to the terms and conditions under which the United States, as trustee, keeps that property restricted.

The United States' obligation with respect to preservation of the restricted trust property and the Congressional commitments to keep the Osage headright properties intact until 1984 carries with it implicit tax immunity. *United States* v. *Rickert*, 188 U.S. 432 (1903) revived by *Squire* v. *Capoeman*, supra (1956).

If in *Squire* v. *Capoeman* the United States Supreme Court's reasoning was right in principle and correct in their holding—then what difference should it make if *Squire* involved a different level of governments, *State* v. *Federal*, or involved a different tribe, Quapaws, instead of Osages.

Indeed the Executive Branch of the Federal Government has already held that *Squire* v. *Capoeman* is right in principle and correct in its holding that Congress intended tax immunity. Since April, 1969 the United States Internal Revenue Service has excluded these Osage headright properties from the taxable gross estate of Osage Indians.

Petitioners contend that the action of the Supreme Court of Oklahoma in holding, as it has in the instant case, created a conflict between Oklahoma's holding of taxability and that of *Squire* v. *Capoeman,* 351 U.S. 1 (1956); and the present United States Internal Revenue Service Ruling 69-164 (April 1969) of nontaxability.

If the Oklahoma Supreme Court decision in the instant (Shelton case) is allowed to stand, then, not only is the law with respect to estate taxes of restricted Osage trust properties unclear but this Court would be giving approval to a State Court's speculation as to changes which might come about if the Supreme Court reviewed its decision.

When a state asserts a doubtful tax claim against Osage tribal trust property, the domiciliary administrators and executors, as well as the United States, as the trustee, are often presented with a close question. (See *Oklahoma* v. *Mason,* 93 S.Ct. at page 2207).

Since this is true hundreds of Domicilary executors and administrators of restricted Osage Indian tribal trust estates, residing in 50 different states, as well as the United States Departmental and inter-departmental agencies should be entitled to know just what the law is so that they are not impeded or delayed in the performance of their duties.

No state can be deprived of its Domiciliary right to assemble the personal assets (of its own deceased citizen)

and to administer and distribute such assets in its own courts according to the directions set out in the Domiciliary Will of the testator. To do otherwise would abort and throw into disarray the long accepted and long established American Probate system.

Therefore, the Domiciliary Courts Administrators and Executors in our fifty different states should be entitled to know what the law is so that they can promptly proceed to follow the law of their particular Domiciliary State without the interference of the United States Interior Department at Pawhuska, Oklahoma, the Oklahoma Tax Commission, the United States Internal Revenue Service and the conflicting opinions and rulings of the different sections of the United States Department of Justice.

There are clear conflicts of interest on the underlying question of the continued validity of the Oklahoma inheritance tax on Osage tribal trust property, including Oklahoma's tax on Osage headrights.

First, there is a conflict between the rights and interests of 49 separate Domiciliary States v. Oklahoma in cases such as this where the decedent's estate was domiciled in a state other than Oklahoma.

Second, there is a conflict existing between the United States Department of Interior and its Osage Agency and the United States Department of Justice on the one hand, who owe a very high fiduciary responsibility to the Osage Indians and to the respondents here who are the co-executors of the Estate of a deceased Kansas Osage Indian who died a non-resident of the State of Oklahoma.

On the other hand the United States Treasury Department and its Internal Revenue Service also had a professional duty to the Government to collect all the tax revenue possible. This revenue collection interest is in direct con-

flict with the duty of the United States to preserve the Osage tribal trust property intact until 1984.

Also there is a direct conflict of interest in the State of Oklahoma between the Oklahoma Tax Commission's duty to see that revenue by taxation is collected; and the duties of the Oklahoma authorities to protect the rights and interests of the Osage tribal mineral trust property and preserve the constitutional rights of the individual Osage Indians and their heirs.

VI.

Whether the State of Oklahoma consistent with the constitution and laws of the United States can levy an inheritance tax on the headrights of a deceased Osage Indian?

It has long been the policy of this government to construe statutory language strongly in favor of the Indians.

The case of *United States* v. *Rickert*, 188 U.S. 432, 437-38 (1903) held that the Indian property was exempt from state and local taxes for the reason that this would constitute a tax on "an instrumentality employed by the United States for the benefit and control of this dependent race. . . ." It should be noted that the alternative holding in *Rickert*, that tax immunity was to be implied from the government's undertaking to keep intact the trust estate, was reconfirmed in *Squire* v. *Capoeman*.

The case of *Carpenter* v. *Shaw*, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 cited by appellee, page 20, the Court also reasoned that the royalty was not taxable.

> Moreover—The leading case of Choate v. Trapp (224 U.S. 665 (1912)—held that allottees acquired a vested property right to exemption from State taxation which was binding on Oklahoma and could not be impaired

> by subsequent congressional action without violation of the Fifth amendment of the Federal Constitution.
>
> In distinguishing the case of Choate v. Trapp, the Court declared that the exemption enjoyed by members of the tribes could not be abrogated by Congress because it had been granted in consideration of this relinquishment of some of their rights and therefore vested in the Indians a property right of which they could not be deprived under the fifth amendment of the Constitution.

If we adopt the assumption (as did the Oklahoma Supreme Court) that an Osage headright is an interest in real estate and is not personal property, then if the real estate is sold to another the headright belongs to the new owner of the land and the Osage is deprived of his property. (See *New Jersey* v. *Wilson*, 7 Cranch. 164 (1812)).

Indeed as early as September, 1779, the New Jersey Supreme Court sitting in Trenton decided the case of *Holmes* v. *Walton*, a case arising under seizure laws which prohibited illegal trading with the enemy. The doctrine then and for the first time laid down has ever since been the law—namely, that ordinary law violating the organic law is void and it is a judicial function when the issue is presented *so to declare it*. See Preface Vol. V of the New Jersey Archives, Vol. V, 2nd Ser. (17-82); III Marshall, 611 by A. J. Beveridge.

And in the Government's Brief in *United States* v. *Mason et al.* (supra) at page 13 Solicitor General Griswold again states:

> "II. The question of the continued validity of the Oklahoma Inheritance tax on the transfer of Osage trust property should be decided by this Court."

CONCLUSION

Since Indian property held in trust by the United States is constitutionally exempt from state taxation, *United States* v. *Rickert,* 188 U.S. 432, 47 L.Ed. 532, 23 S.Ct. 478; *McCurdy* v. *United States,* 264 U.S. 484, 68 L.Ed. 801, 44 S.Ct. 345—and,

Since the decision below is legally erroneous and in irreconcilable conflict with prior decisions of this court and other Federal courts, see *Taylor* v. *Tayrien,* (CCA 10th Okla.) 51 F.2d 884; *McCurdy* v. *United States,* 264 U.S. 484, 68 L.Ed. 801, 44 S.Ct. 345; *Squire* v. *Capoeman,* 351 U.S. 1 (1956)—and,

Since the imposition of the tax in controversy would interfere with the Government's duty to the Osage Indian by diminishing the trust estate, *Squire* v. *Capoeman,* 351 U.S. 1 (1956); Cf. *Re Denison,* (DC Okla.) 38 F.2d 662; Cf. also *Choate* v. *Trapp,* 224 U.S. 665, 56 L.Ed. 941, 32 S.Ct. 565—and,

Since so far as the corpus of the trust property is concerned, all the restricted Osage Indian has, and all he passes on to his heirs (until 1984), is the right to certain quarterly payments from the trust estate so long as the property continues to be held in trust by the Federal Government. *McCurdy* v. *United States,* 246 U.S. 263, 62 L.Ed. 706, 38 S.Ct. 289; See *Taylor* v. *Tayrien,* (CCA 10th Okla.) 51 F.2d 884.

We submit that the State of Oklahoma cannot, consistent with the constitution and laws of the United States, levy an inheritance tax on the headrights of a deceased Osage Indian.

WHEREFORE, premises considered, petitioners pray that a writ of certiorari issue to review the judgment of

the Supreme Court of Oklahoma entered in the above captioned case on December 16, 1975 in Cause No. 47430 in that court. (544 P.2d 495).

Respectfully submitted,

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April, 1976

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF OKLAHOMA

No. 47430

(Decided Dec. 16, 1975)

ESTATE of Jacqueline Elkins SHELTON,
Appellant,

v.

OKLAHOMA TAX COMMISSION,
Appellee.

Appeal was taken by estate of Kansas decedent from decision of Oklahoma Tax Commission denying refund of inheritance taxes paid under protest on Osage Indian headrights. The Supreme Court, Doolin, J., held that such headrights are includable in decedent's gross estate for inheritance tax purposes and the Kansas decedent's rights were tangible property subject to Oklahoma inheritance tax.

Affirmed.

1. Indians (Key) 10

An Osage "headright" is interest that member of tribe has in Osage tribal trust estate; right to receive trust funds and mineral interest at end of trust period and to royalties arising from mineral estates and interest on trust fund during such period. Osage Act, 34 Stat. 539; Act Mar. 3, 1921, 41 Stat. 1249; Act Mar. 2, 1929, 45 Stat. 478; Act June 24, 1938, 52 Stat. 1034.

See publication Words and Phrases for other judicial constructions and definitions.

2. Taxation (Key) 864

Oklahoma Osage Indians' headrights are includable in decedent's gross estate for inheritance tax purposes. Osage Act, 34 Stat. 539; Act Mar. 3, 1921, 41 Stat. 1249; Act Mar. 2, 1929, 45 Stat. 1478; Act June 24, 1938, 52 Stat. 1304.

3. Taxation (Key) 864

Until such time as holder of Osage Indian headrights receives his quarterly distribution from trust estate, the headrights, or interest in royalties, are an interest in real estate and are tangible property subject to Oklahoma inheritance tax. Osage Act, 34 Stat. 539; Act Mar. 3, 1921, 41 Stat. 1249; Act Mar. 2, 1929, 45 Stat. 1478; Act June 24, 1938, 52 Stat. 1034.

4. Taxation (Key) 864

Osage Indian headrights of decedent who died a resident of Kansas were tangible property subject to Oklahoma inheritance tax and were not intangible personal property subject to taxation in Kansas. K.S.A. 79-1501 (e); 68 O.S.Supp.1975, § 807(A)(1) b.

Appeal from Oklahoma Tax Commission.

An appeal by estate of Kansas decedent from a decision of the Oklahoma Tax Commission in ancillary probate proceedings, denying a refund of taxes paid under protest by estate on Osage Indian headrights. Affirmed.

Donald C. Little, Kansas City, Kan., Matthew Kane, Jr., Pawhuska, for appellant.

Lester D. Hoyt, Gen. Counsel, Okl. Tax Commission, Stanley J. Alexander, Clyde E. Fosdyke, Oklahoma City, for appellee.

DOOLIN, Justice.

This is an appeal from a decision of the Oklahoma Tax Commission (Commission) disallowing a refund to appellant estate of Jacqueline Elkins Shelton, for estate taxes paid under protest. The protested tax was levied upon 10.77837 Osage Indian headrights owned by decedent at her death.

We are called upon to decide whether Oklahoma has the power to levy an inheritance tax on Osage Indian headrights and if so whether the situs of these headrights is in Oklahoma even though the deceased was a resident of another state.

Jacqueline Elkins Shelton, an Osage Indian, died a resident of Kansas City, Kansas. Her estate was probated in Kansas and ancillary proceedings were filed in Colorado and Oklahoma.

The Oklahoma Tax Commission issued an order pursuant to the Oklahoma proceedings, increasing the amount of tax due from the estate, by including in the gross estate the "headrights" owned by her at her death. Appellant estate paid the additional taxes under protest and filed its claim for a refund with the Commission contending that headrights are not taxable in Oklahoma.

A hearing was held before the Commission on September 21, 1973. The Commission upheld the order, finding that the Osage headrights were not intangibles but rather represented an "interest in the mineral rights located under land in Osage County," and thus were properly taxable in Oklahoma. The estate appeals.

Osage Indian headrights stem from the Osage Allotment Act of June 28, 1906, 34 Stat. 539. This act provided for tribal land to be divided equally among members of the Osage tribe. The act further provided that only by receiving a certificate of competency from the Secretary of the Interior could an individual allottee alienate his land. In addition, the act created "headrights" which were the individual's share of the minerals located in and under tribal lands.

[1] These minerals and the income derived from them were placed in trust with the United States for 25 years and also made inalienable until legal title to the oil, gas and other minerals would vest in the individual on the basis of his headrights, at the end of the trust period. This 25 year trust period has been extended several times[1] and at present time does not expire until 1984. The accrued royalties from the minerals were to be credited and paid quarterly to each allottee or his heirs, pro rata. This right to receive the trust funds and the mineral interests at the end of the trust period, and to the royalties arising from the mineral estates and interest on the trust fund during such period is defined as a "headright." See *West v. Oklahoma Tax Commission*, 334 U.S. 717, 68 S.Ct. 1223, 92 L.Ed. 1676 (1948), *United States v. Mason*, 412 U.S. 391, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973), and Cohen, Handbook of Federal Indian Law (1958) pp. 450-455.

Appellant contends that by virtue of *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956), until a grant of minerals is issued to the individual at the end of the trust period, neither the federal government nor the

1. The Act of March 3, 1921, 41 Stat. 1249 extended the trust period to 1946; the Act of March 2, 1929, 45 Stat. 1478 to 1958; and the last extension, the Act of June 24, 1938, 52 Stat. 1034, provided that the extension would continue until January 1, 1984.

state has the power to subject these rights to taxation. In *Squire* the question was whether the proceeds of the sale of timber on Indian allotted lands in the State of Washington could be subject to federal income taxes. The Court held that, in view of the provision of the 1887 General Allotment Act, 25 U.S.C.A. § 331 et seq. that the government must convey the land to the allottee at the end of the statutory restricted period free of all charges or encumbrances, taxation would be unreasonable and a breach of faith with the Indians, and the proceeds from the sale of timber were not taxable.

That case, however, was concerned with *federal income* taxes and not state inheritance taxes and was based on a different allotment act with different provisions.

The question of Oklahoma estate taxation of Indian headrights was squarely presented to the United States Supreme Court in *West v. Oklahoma Tax Commission* supra. The Court, while recognizing that permitting the imposition of inheritance taxes on trust properties such as Osage Indian headrights might result in depleting the trust corpus, held that this is the normal and intended consequences of this type of a transfer tax and until Congress affirmatively indicates that this burden requires immunity from such taxes, headrights are properly included within the taxable estate of a deceased Indian.

The Court in *West* felt that the decision in *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943) was controlling. That case held that a restriction on alienation, without more, was not the equivalent of a congressional grant of estate tax immunity. Although the restriction in the latter case was on cash and securities held by the Department of Interior, the *West* Court did not see any difference for estate tax purposes between restricted personal property and the Osage head-

right property. The effect which an estate or inheritance tax might have is the same in both instances. The fact that the United States hold legal title to the trust property but not as to the restricted property afforded no distinguishing characteristic.

Appellant apparently believes that the *West* decision has been slowly eroded by subsequent decisions such as *Squire v. Capoeman* supra, *Big Eagle v. United States*, 300 F.2d 765, 156 Ct.Cl. 665, (1972) and *Mason v. United States*, 461 F.2d 1364, 198 Ct.Cl. 599, (1972). The *Mason* Court of Claims' decision however, was reversed by the United States Supreme Court in *Mason v. United States* supra, which held that the United States did not breach its fiduciary duty by adhering to *West* and paying Oklahoma inheritance taxes assessed against the estate of a restricted Osage Indian. The Court held that *Squire* did not overrule *West*, and further did not agree with the Court of Claims that the foundations of *West* had been weakened by lower court decisions. "Although, it might be fair to say that over the years the fringes of the *West* doctrine have been worn away, its core holding remains unimpeached by any decisions of this or any other court." *United States v. Mason, supra*, 93 S.Ct. at p. 2207.

Appellant's reliance on lack of taxation of Mrs. Shelton's estate by the federal government is also shown to be misplaced. The *Mason* Court states in footnote 8, 93 S.Ct. p. 2207 that "It is obvious, however, that Internal Revenue decisions as to the scope of its own taxing power have no effect on the taxing power of the States."

[2] We thus hold that until Congress exempts Indian headrights from state taxation or *West* is affirmatively overruled, Oklahoma Osage Indian headrights shall be included in a decedent's gross estate for inheritance tax purposes.

Appellant also argues that even if the headrights were properly taxable in Oklahoma, Mrs. Shelton died a resident of Kansas whereas the decedent in *West* was an Oklahoma resident. It feel that if the headrights are taxable through *West*, they should be subject to taxation only in Kansas as intangible personal property, which because of reciprocity statutes of Kansas 79-1501(e) K.S.A. and Oklahoma 68 O.S. 1971 § 807(A)(1)(b) as amended by 68 O.S. § 807(A)(1)(b) (Supp.1975) is taxable at domicile of decedent. The Commission contends that headrights are not intangibles, but rather an interest in real estate and thus tangible property to be taxed at its situs.

Headrights are sometimes defined as the right of Osage Indians to participate in the distribution of *mineral royalties* placed in the Treasury of the United States to the credit of the Osage tribe together with the interest on a per capita basis in the mineral estate itself. *Taylor v. Tayrien*, 51 F.2d 884 (10th Cir. 1931). In effect the headrights are interests in unaccrued royalties arising from mineral interests.

[3, 4] *McCully v. McCully*, 184 Okl. 264, 86 P.2d 786, (1939) holds unequivocally that while accrued royalties are personal property, "unaccrued royalty is real and not personal property." The Commission feels that until such time as the holder of the headrights receives his quarterly distribution from the trust estate, the "headrights" or interest in the royalties are an interest in land and thus located where the land is, in Oklahoma. We agree. The reference in the editorial syllabus in *West supra* to "Osage mineral headrights and other personal property," is merely a "lapsus linguae" and is not to be held as controlling. Headrights are not personal property because they have not been reduced to possession but are an interest in real property. Also see *Peppers Refining Com-*

pany v. Barkett, 208 Okl. 367, 256 P.2d 443 (1953), *In Re Shailer's Estate*, 266 P.2d 613 (Okl. 1953).

Affirmed.

All the Justices concur.